In the Supreme Court of the United States

OCTOBER TERM, 1957

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No. ~~994~~ 64

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PERMIAN BASIN PIPELINE COMPANY,
a Corporation,

Appellant,

v.

RAILROAD COMMISSION OF TEXAS and
THE ATLANTIC REFINING COMPANY,
a Corporation,

Appellees.

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ON APPEAL FROM THE COURT OF CIVIL APPEALS, THIRD SUPREME JUDICIAL DISTRICT OF TEXAS, AT AUSTIN

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BRIEF IN OPPOSITION TO APPELLEES' MOTION TO DISMISS OR TO AFFIRM

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LAWRENCE I. SHAW,
*F. VINSON ROACH,
JACK C. OSBORNE,
PATRICK J. McCARTHY,
2223 Dodge Street,
Omaha 1, Nebraska.

R. DEAN MOORHEAD,
Perry-Brooks Building,
Austin, Texas,
Attorneys for Permian Basin Pipeline Company, Appellant.

*Attorney upon whom service should be made.

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Law Briefs — OMAHA LINO-SLUG PRINTING CO., 418 So. 15th St.

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Prior to a consideration of the question which Appellees in their Motion To Dismiss Or To Affirm and Brief in support thereof state to be the issue in this case—which, as will be shown, is not involved herein at all—Appellant desires to point out to the Court that much of Appellees' Brief concerns matters which are not even remotely connected with this case. *This case does not involve*:

1. Oil (Appellees' Brief, pp. 2-6). This case involves the sale in interstate commerce of natural gas for resale. Such sale is subject to the exclusive jurisdiction of the Federal Power Com-

mission. There is no comparable federal regulation of the sale of oil and, consequently, no conflict of federal and state regulation with respect thereto. All of Appellees' discussion, quotations and citations of authority concerning marketing of oil are, therefore, entirely irrelevant.

2. Monopoly and unlawful drainage in the purchase of gas (Appellees' Brief, pp. 3-4, 11-13). Every cubic foot of gas purchased by Appellant prior to the issuance of the Railroad Commission Orders under attack herein was purchased pursuant to contracts arrived at voluntarily and after good faith, arms-length bargaining. Monopoly and unlawful drainage are not an issue in this case and any allusion thereto by Appellees should be disregarded by this Court.

3. Conservation and waste (Appellees' Brief, pp. 4-6). By stipulation (R. 160-162) of the parties during the trial of this case it was agreed that the question of waste and, therefore, conservation, was not involved herein. The reference to and discussion of waste and conservation, as contained in Appellees' Brief, is academic and totally irrelevant to the issues in this case.

It is respectfully submitted that the above matters are not material to the issues in this case and that this Court should disregard all references thereto contained in Appellees' Brief.

I.

Appellees' Motion and Brief in support thereof state the question in this case to be "whether the production

of gas from a Texas gas field is to be prorated by the State of Texas or by an interstate carrier of natural gas." Of course, if this were the real question involved Appellant would not be engaged in this litigation, since it has never contended that a state does not have jurisdiction to regulate, *by proper means*, the physical aspects of the production of natural gas (Jurisdictional Statement, p. 14). Appellees' statement of the question involved assumes the very answer to be determined by this Court, namely, that under the facts as set forth in the Jurisdictional Statement filed herein, the Common Purchaser Act and the Orders of the Railroad Commission regulate only the physical aspects of the production of natural gas and not sales in interstate commerce of natural gas for resale.

Appellees state in their Brief (p. 6) that the statute (i. e., the Common Purchaser Act) and Orders of the Railroad Commission do not compel Appellant to purchase any gas. This statement is in direct contradiction of the mandate in both the statute and the Orders. Section 8aa of the Common Purchaser Act (Jurisdictional Statement, Appendix E-2) contains the explicit command that:

> "* * * any * * * persons * * * operating any pipeline, which may * * * purchase * * * natural gas in this State, whether they be a common carrier or affiliated with common carriers or not, shall be a common purchaser of * * * natural gas, and *shall purchase * * * natural gas, offered it for purchase without discrimination* * * *." (Emphasis added.)

The order appealed from, when read in conjunction with such statute, also leaves no room for doubt that Appellant must purchase any gas offered for sale. Such or-

der expressly declares (Jurisdictional Statement, Appendix B-20):

> "IT IS FURTHER ORDERED that Permian Basin Pipe Line Company, purchaser of gas from the subject field, is declared by the Commission to be a common purchaser of gas from the field, that all facilities furnished for one producer will be furnished to all other producers so that each producer will be afforded the opportunity to produce and market without restraint his ratable share of gas * * *."

In the light of these specific declarations, Appellees' protestations that such statute and Orders do not require Appellant to purchase gas are hollow indeed.

The principal contention throughout Appellees' Brief in support of their Motion is that the Common Purchaser Act and the Railroad Commission Orders issued thereunder are concerned *only* with the production of natural gas and concern not at all the purchaser or the conditions of purchase. If this were true, of course, there would have been no necessity for the issuance of the Orders against Appellant herein, *for it is not engaged in the production of natural gas.* Further, the plain wording of the Act itself is conclusive in respect to its intent and application. The regulation under the Common Purchaser Act is of purchasers and purchases (i. e., buyers and sales) not producers and the physical aspects of production. In this connection, Appellant desires to point out to the Court that there is no question of *intrastate* sales of gas involved in this case and that Appellees' numerous comments concerning the Railroad Commission's jurisdiction with respect thereto are wholly irrelevant and should be disregarded. The precise question herein concerns the state's authority to, in any man-

ner, regulate the sales to Appellant in interstate commerce of natural gas for resale.

Appellant admits that the Common Purchaser Act and the Railroad Commission Orders herein do not contain the word "price." This in no way detracts, however, from Appellant's position that such statute and Orders do in fact contemplate and require the Railroad Commission to regulate the price at which Appellant purchases gas in this field. That this interpretation is correct is conclusively shown by the construction placed on the Common Purchaser Act by the statutory three-judge Federal Court in *Texoma Natural Gas Co. v. Railroad Commission of Texas,* 59 F. 2d 750 (W. D. Texas, 1932), wherein such Act was held unconstitutional. In such case, the Court held (59 F. 2d 754):

> "The act directs the common purchaser to buy gas when offered for sale by others, but is silent as to the price to be paid, and all other essentials are left to conjecture."

It is interesting to note that Appellees have studiously avoided any reference to the *Texoma* case in their Brief. This is easily understandable since the Court in that case concluded that the Common Purchaser Act contemplated and required the Railroad Commission to fix the price and other terms and conditions for the sale of gas to a common purchaser. Such decision held the Common Purchaser Act unconstitutional even before enactment of the Natural Gas Act where price and other terms and conditions of purchases and sales, as here in issue, were brought within the exclusive jurisdiction of the Federal Power Commission. Appellant urges this Court's serious consideration of the opinion in the *Texoma* case and respectfully submits that such case provides a complete

answer to Appellees' argument respecting regulation of price.

II.

Appellees' Brief (p. 16) dismisses Appellant's claimed infringement of private property and contractual rights with the sweeping declaration that it is "even more frivolous" than the alleged conflict of federal and state regulation. This assertion, together with the reference to *Cities Service Gas Co. v. Peerless Oil & Gas Co.*, 340 U. S. 179, will not, however, provide the answer as to how a state can, by mere declaration alone, convert a private interstate pipeline company into a common carrier and rewrite gas purchase contracts between private parties. We must again reiterate that, in this case, waste, conservation or any other issue of public interest which would give the state a legitimate concern, are not involved. All acts complained of by Appellee, The Atlantic Refining Company, were done pursuant to contractual provisions which it freely and presumably in good faith agreed to. No citation of authority is required to sustain the proposition that a party cannot accept the benefits of a contract and at the same time reject the burdens thereof. In the absence of an overriding public interest, which in this case could only have been a matter of conservation of natural gas, a party to a contract is bound by his bargain, improvident though it may have been. Cf. *Federal Power Commission v. Sierra Pacific Power Company*, 350 U. S. 348, 76 S. Ct. 368.

WHEREFORE, Appellant prays that the Motion To Dismiss Or To Affirm be denied and that this Court take jurisdiction to determine the substantial federal questions presented by this appeal.

Respectfully submitted,

LAWRENCE I. SHAW,
*F. VINSON ROACH,
JACK C. OSBORNE,
PATRICK J. McCARTHY,
2223 Dodge Street,
Omaha 1, Nebraska.

R. DEAN MOORHEAD,
Perry-Brooks Building,
Austin, Texas,
Attorneys for Permian Basin Pipeline Company, Appellant.

*Attorney upon whom service should be made.
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